P/33
Brief for Plaintiff in Error
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Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 152.

THE GUTHRIE NATIONAL BANK, PLAINTIFF IN ERROR AND APPELLANT,

vs.

THE CITY OF GUTHRIE.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR AND APPELLEE.

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IN THE

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vs.

THE CITY OF GUTHRIE.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR AND APPELLEE.

Statement of the Case.

By a proclamation of the President, issued under date of March 3, 1889, in pursuance of the act of March 1, 1889 (25 Stat., 757), ratifying a treaty made between the United States and the Creek Indians, what is now known as the Territory of Oklahoma was thrown open to settlement, subject to the conditions and restrictions imposed by the act of March 2, 1889 (25 Stat., 1004).

By the act of May 2, 1890 (26 Stat., 81), Congress provided a temporary form of government for the Territory, which became and is the organic law of the Territory.

On May 14, 1890 (26 Stat., 109), Congress enacted a law regulating town-site entries of lands in the Territory, under which certain trustees were to be appointed by the Secretary of the Interior to determine the location of town sites, supervise the necessary surveys, and approve the surveys already made by the inhabitants of the Territory.

After the Territory was opened for settlement, and before the passage of the organic act of May 2, 1890, and the act of May 14, 1890, a number of town sites were located and settled upon by the inhabitants of the Territory, the lands being surveyed into streets, alleys, squares, blocks, and lots, and what were known as provisional municipal governments were formed. Officers thereof were selected by the people of the respective towns and a form of government was attempted to be carried on. The persons so chosen as officers incurred indebtedness in carrying on the so-called governments without any authority or power to raise the necessary revenues, by taxation or otherwise, to pay the same.

Upon the assembling of the first territorial legislature, in December, 1890, a code of laws for the permanent government of the Territory was enacted, and thereupon these provisional city governments, acting under authority of said laws, were incorporated and became legal municipal governments. In this manner the provisional governments of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, lying adjacent to one another, were consolidated into the regularly organized village of Guthrie.

Thereafter, in order to provide a method by which to raise funds to pay off the indebtedness incurred by the so-called provisional governments of the four villages named, the legislature passed the act of December 25, 1890, being chapter 14, article 1, of the Statutes of Oklahoma (edition of 1890), which is printed in the appendix hereto.

Acting under the pretended authority of the last-mentioned act, the district judge of Logan county appointed a commission, consisting of three persons, to audit and adjust

certain claims then existing and incurred by the persons assuming to act as officers of these so-called provisional governments (Rec., p. 3).

The commission so appointed proceeded to act under authority of the act mentioned (Rec., p. 3), and on September 1, 1891, filed in the district court of Logan county what is known as its final report (Rec., pp. 4–7). Upon the filing of this report the matter was docketed as an action pending in that court (Rec., p. 7), and on April 7, 1893, the City of Guthrie, the successor of the village of Guthrie (Rec., p. 7), filed its exceptions to the report (Rec., pp. 8 to 12).

On March 17, 1893, the Guthrie National Bank, appearing in court for the first time in the matter and alleging ownership of a number of the claims involved, filed a motion asking the court to approve the finding of the commission as regards the claims held by it (Rec., p. 13), which amounted to $4,315.22 (Rec., p. 16). The matter was allowed to remain undisposed of until March 28, 1896, when the City of Guthrie filed a motion in the district court to dismiss the proceeding by the bank, and to dismiss all proceedings based upon the act mentioned for the reason that the act and all proceedings under it were void (Rec., pp. 16 to 28).

On April 2, 1896, the matter came on for hearing upon the motion of the bank to confirm the report of the commission, the exceptions of the city to the report, and the motion to dismiss filed by the city. The court on the last-named date sustained the motion of the city and dismissed the proceeding for the reason that the act under which the commission was appointed was unconstitutional and void; to which order of the court the bank took its exceptions (Rec., p. 29).

The bank thereupon prosecuted error to the supreme court of the Territory to reverse the order of the district court. On June 11, 1897, the supreme court affirmed the order of the district court dismissing the proceeding (Rec., p. 33), and rendered judgment against the bank for costs.

To reverse the judgment of the supreme court of the Ter-

ritory, an appeal was taken to and a writ of error sued out from this court.

Synopsis of Argument.

It is contended on behalf of the City of Guthrie that, there being involved in this proceeding not more than the sum of $4,315.22, this court has no jurisdiction, the jurisdictional amount being $5,000.

2. That even if there were a sufficient amount involved, yet, as the plaintiff in error and appellee was not a party before the district court, it was not a party before the supreme court of Oklahoma, and therefore cannot be heard here.

3. That, even if it was a party before the district court, as it alone of all the parties appealed to the supreme court of Oklahoma, and as there was no summons and severance, the latter court had no jurisdiction, and therefore this court cannot review its decision.

4. Admitting, however, that this court has jurisdiction, it is further contended that the act which gave birth to this proceeding is invalid because it does not afford due process of law for the determination of the claims against the city, as the commission appointed thereunder for that purpose was not a judicial body, and no judicial review was provided for.

5. That, admitting the validity of the law in the above respect, it provides a method of determining questions of fact by a means other than trial by jury.

6. That the act is special legislation and forbidden by the act of July 30, 1886 (24 Stats., 170).

7. That it creates a new forum for the determination of questions properly cognizable by a court, and that no judicial hearing of such questions is provided for.

8. That, admitting the jurisdiction of this court and the validity of the legislation, it is contended that the claims herein are not valid against the city because they arise out of debts contracted by persons who were not even *de facto* officers.

ARGUMENT.

I.

Jurisdiction.

(a.) *Certificate of Counsel.*—At the threshold of the case we are confronted with the question of the jurisdiction of this court to consider it.

By the act of March 3, 1885 (chap. 355, 23 Stats., 443), it was provided that in cases arising in the Territories, which involved $5,000 or over, there should be a right to a review by this court on appeal or writ of error of the judgments and decrees of the supreme courts of the Territories, and by the act of May 2, 1890 (chap. 182, 26 Stats., 81), organizing the Territory of Oklahoma, it was provided in section 9 that—

> "Writs of error and appeals from the final decisions of said supreme court [of the Territory] shall be allowed and may be taken to the Supreme Court of the United States, in the same manner and under the same regulations as from the circuit courts of the United States, where the value of the property or the amount in controversy, to be ascertained by oath or affirmation of either party or other competent witness, shall exceed five thousand dollars."

Opposing counsel certifies (Rec., pp. 34 and 39)—

> "That he is one of the attorneys for the plaintiff in error; that he is familiar with the controversy involved in this case, and knows the amount at issue therein and

involved therein and of controversy therein, and knows the amount in controversy in said cause, exclusive of costs, to exceed the sum of $5,000."

The amount of the claims presented to and considered by the commission is shown by the record to have been in excess of $5,000 (Rec., p. 7). The amount claimed to be owned by the Guthrie National Bank, however, is stated by the petition in error to the supreme court of the Territory of Oklahoma to be $4,315.22 (Rec, p. 16). The amount in controversy being thus specifically shown by a pleading in the case, can this court be given jurisdiction by the certificate above quoted which contradicts such showing? (Richmond *vs.* Milwaukee, 21 How., 391; Red River Cattle Co. *vs.* Needham, 137 U. S., 632, 634.) There is nothing in the record to indicate that the case involves, so far as the appellant and plaintiff in error here is concerned, any larger amount than $4,315.22. It may be true that the disposition of this case will determine other similar controversies, and dispose of the remaining claims which were reported upon by the commission to the district court; but such claims of other parties are not before this court. The bank alone appealed to the supreme court of the Territory, and nothing more than was before that court is presented here.

It is contended on behalf of the city that the provision of the organic act of the Territory in relation to a certificate of counsel as to the amount in controversy in any suit, for the purpose of determining the right to a review of a judgment therein by this court, was intended by Congress to apply to cases in which the amount actually involved was not shown in the pleadings in the case, and was never intended to cover cases where the record disclosed the amount involved. Certainly Congress never intended that counsel could by a certificate impeach the accuracy of the record in the case, and that such certificate, notwithstanding the averments of the pleadings, should give jurisdiction to this court. Congress

doubtless intended merely to provide that where the amount was not specifically shown in the record, but was actually involved in the case, it might be ascertained by the certificate of counsel (U. S. *vs.* Trans-Missouri Freight Association, 166 U. S., 290, 310).

If it shall be urged that to the amount claimed in the petition in error, viz., $4,315.22, there should be added interest, in accordance with the provisions of the act of the territorial legislature, which if computed to the present time would make up the jurisdictional amount of $5,000, the answer is that if interest is to be taken into consideration at all, it began to run, under the terms of the act, when the commission allowed the claims owned by the bank; that that finding was in 1892 (Rec., p. 13); that if there was any distinct point of time when the proceeding of the bank against the city commenced, it was when the bank submitted its motion and petition to the district court to approve the claims owned by it which had been allowed by the commission, which was on March 17, 1893 (Rec., p. 13), and that interest at 6 per cent. on the amount of the claims from an unknown month and day in 1892 to March 17, 1893, say fifteen months, would still leave the amount involved less than $4,700. Certainly the interest which has accumulated since the time of bringing suit cannot be held to have been sued for when the action was brought.

(*b.*) *The Bank Not a Party.*—When the case was pending in the district court of Logan county it was entitled "J. W. McNeal *et al.*, including all claims, *vs.* The City of Guthrie" (Rec., p. 8). It nowhere appears that the Guthrie National Bank was a party to the proceeding, unless it was covered by the blanket "*et al.*" Section 3995, Statutes of Oklahoma, provides that "the title of a cause shall not be changed in any of its stages." Indeed, it may be inferred from the language of the petition in error (Rec., p. 20), "and thus acquired and became the owner of divers and sundry of

such claims so audited and allowed by said board," that at the time of the report of the commission to the court the bank was not the owner of the claims asserted by it. Furthermore, the name of the bank does not appear as the owner of any of the claims passed upon and allowed by the commission (Rec., p. 5 *et seq.*). It is not shown in the record that after the bank acquired ownership of the claims it was made a party to the proceedings in the district court, even if it could be made a party, which we deny. No assignment or other proof of ownership appears; nothing but an allegation of ownership (Rec., pp. 4, 5, 13). If the bank was not a party to the proceedings in the district court, but afterwards by proper assignment became the owner of the claims asserted here, in the absence of proof of ownership and application to the district court to be made a party to the case, it was not a party in the court below, and cannot therefore be heard here.

It is to be noted also that the petition of the bank above referred to was not verified, as required by section 3986, Statutes of Oklahoma, and that no proof was offered to show ownership by the bank.

(c.) *No Severance.*—Supposing, however, that the bank was, and was properly, a party before the district court, it is apparent from the petition in error (Rec., p. 2), and from its exception to the ruling of the court (Rec., p. 29), that it was not the only party plaintiff. The petition for a writ of error to the supreme court of Oklahoma was by the Guthrie National Bank alone (Rec., p. 1). There does not appear to have been any summons and severance of the parties. Without such action the court below had no jurisdiction, and therefore this court has no jurisdiction to review its decision (Estis *vs.* Trabue, 128 U. S., 225, 230).

II.

Article 1, chapter 14, Statutes of Oklahoma, violates section 1 of the fourteenth amendment to the Constitution of the United States, in that it attempts to take property without due process of law.

(*a.*) *The Statute.*—Chapter 14, article 1, Statutes of Oklahoma, provides for the appointment by the district judge of Logan county of a commission of three persons, whose duty it shall be to "inquire into and pass upon all claims and demands of every character heretofore issued by the city governments mentioned in the caption" of the act. The owners of these claims and demands are required (section 3) to present them to the commission for examination and approval or disapproval. The commission is required to keep a record of all claims filed with them for allowance, and the claims are to be presented within the time fixed by the act.

Section 4 provides that "after the commission or referees shall have passed upon and allowed any and all claims mentioned in this act, they shall make a report to the district court of the same, showing the names and amounts allowed by them, and also all claims and the names of the persons and amounts disallowed by them for approval or disapproval of the district judge; and all claims allowed and approved by the district judge shall be certified to the mayor and council of the village of Guthrie, who are authorized and directed to issue warrants" upon the village for their payment at the times and in the manner stated in the act.

It is to be observed that the act of the district judge either approving or disapproving the findings of the commission is final. No provision is found in the act for a review of his decision by any higher court of the Territory,

and no reference is therein made to any other act or statute. The act was designed to be a special method, summary in character, for determining the merits of claims and demands asserted against the City of Guthrie. It is not ambiguous and must be construed to mean just what its language imports.

The act forms no part of the general code of civil procedure, nor does it bear any relation thereto, nor is there any reference in the act to the code or to any other provision of the statutes. The act must fail unless it is sufficient in itself, for it does not form any part of the existing system of procedure and has nothing else in the statutes to supply its deficiencies.

Risser *vs.* Hoyt, 53 Mich., 185, 209.

It is therefore insisted that the act in question attempts to take property without due process of law, in that it does not provide adequate judicial machinery for determining the claims made against the city.

(*b.*) *The rule in construing statutes.*

It is a cardinal rule in the interpretation of statutes that when there is no ambiguity in the language used the court will give to the words of the statute their ordinary grammatical construction.

In the recent case of U. S. *vs.* Goldenberg, 168 U. S., 95, Mr. Justice BREWER, speaking for the court, states the rule thus (page 102):

> "The primary and general rule of statutory construction is that the intent of the law-maker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for

believing that the letter does not fully and accurately disclose the intent. No mere omissions, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

Gibbons *vs.* Ogden, 9 Wheat., 188.
Smith on Stat. & Cons. Constr., sec. 481.
Sedgwick on Stat. and Cons. Law (2d ed.), p. 195.
Story on Const., sec. 451.

This rule is clearly applicable to the statute under discussion. There is no ambiguity in the language used. Its provisions are clearly stated, and the court in construing it will give the words their ordinary meaning; and, though the act be incomplete and fail to provide due process of law, yet, under the rule above quoted, this court will not read into the act by judicial construction those provisions, necessary to make it valid, which have clearly been omitted by the legislature.

It is true that the supreme court of Oklahoma had considerable difficulty in solving this question, and that in the cases of Territory *ex rel. vs.* City of Guthrie, 1 Okla., 404; Guthrie *vs.* Bank of New Vienna, 4 Okla., 194, it held that a party asserting a claim, or the city, had the right to have any claim docketed and tried in the district court to the court or a jury; but in order to reach that conclusion that court had to surmount the objections that the act was special and denied the city a proper hearing, by engrafting upon it the provisions of law regulating procedure in the courts of the Territory, contained in section 9 of the organic act. It was compelled, in order to make the act valid, to read into it a provision omitted by the legislature; but that act contains no language from which, even by a strained construction, it could be concluded that, after the court had approved or disapproved the claim, a trial could be had as in other cases. The legislature intended to and did provide a special

method of procedure, a finding by a commission or referees and an approval by the district court. Nothing was provided to the effect that upon the approval or disapproval the matter should be docketed and a trial had as in other cases under the general code of procedure.

If the legislature intended to provide a trial, as in other cases, after approval or disapproval of the report of the commission, what necessity was there for the appointment of referees to determine the validity of the claims and demands? If the matters were to be tried anew upon the application of the claimant or the city, what object was there in providing for the hearing before the referees? The legislature did not intend that the claims should be prosecuted under the general law, because it provided for a reference to a commission. The act provides a special method of procedure, irrespective and independent of the provisions of the general code. In the cases of Guthrie *vs.* Wylie *et al.*, 55 Pac. Rep., 103, and Bank of Guthrie *vs.* McElhinney, 5 Okla., 107, the supreme court of the Territory seems to have grasped the idea of the legislature in passing the act, for in the latter cases it reversed its former rulings and held that the act was void, for the reason that it did not provide that the city should have a proper hearing, with a right of appeal, as in similar cases, and that it attempted to affix a liability upon the city without due process of law.

Again, the act having no relation or connection with the general code of civil procedure, must be deemed to be a special remedy enacted for the particular purpose stated in its title. That being so, the rule of statutory construction that when there is special legislation on a particular subject, the general legislation must be deemed to have been superseded by the special, applies. As said in Magone *vs.* King, 1 U. S. App., 267:

> "It is a settled rule of statutory construction that general legislation must give way to special legislation on the same subject, whether the provisions are found

in the same statute or in different statutes; and general provisions must be interpreted so as to embrace only cases to which the special provisions are not applicable."

Citing—

Churchill *vs.* Crease, 5 Bing., 189.
State *vs.* Clarke, 25 N. J. Law, 54.
Long *vs.* Culp, 14 Kan., 412.
Felt *vs.* Felt, 19 Wis., 193.
State *vs.* Inhabitants of Trenton, 38 N. J. Law, 64.
Townsend *vs.* Little, 109 U. S., 504.

(c.) *What constitutes due process of law.*

In attempting to discuss the meaning of the term "due process of law," we are confronted at the outset with the difficulty of framing a definition which will correctly express the term when applied to all cases. Perhaps the first general definition of the term is that found in the case of Pennoyer *vs.* Neff, 95 U. S., 714, wherein this court, speaking through Mr. Justice FIELD, said, page 733:

> "Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit."

Respecting the meaning of the term Mr. Justice MILLER, in Davidson *vs.* New Orleans, 96 U. S., 97, says, middle page 105:

> "But, however this may be, * * * it is not possible for us to hold that a party has, without due process of law, been deprived of his property, when, as regards

> the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."

In Hurtado *vs.* California, 110 U. S., 516, the meaning of the term is exhaustively discussed by Mr. Justice MATTHEWS. He says (bottom page 535):

> "Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial.'"

Middle page 536 he quotes with approval the language of the court in Brown *vs.* Commissioners, 50 Miss , 468, saying:

> "The principle does not demand that the laws existing at any point of time shall be irrepealable, or that any forms of remedies shall necessarily continue. It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by 'due process of law.'"

To the same effect are the decisions in Hagar *vs.* Reclamation District, 111 U. S., 701, 707; Westervelt *vs.* Gregg, 12 N. Y., 202, 209; Turnpike Co. *vs.* Parks, 50 O. S., 568, 579; Burton *vs.* Platter, 10 U. S. Appeals, 657; Central Land Co. *vs.* Laidley, 159 U. S., 103, 112; People *ex rel. vs.* Supervisors, 74 N. Y., 234; Leeper *vs.* Texas, 139 U. S., 462; Marchant *vs.* Penna. R. R., 153 U. S., 380.

In Weimer *vs.* Bunbury, 30 Mich., 214, respecting the meaning of due process, the court, speaking by COOLEY, J., says, page 214:

> "The bills of rights in the American constitutions have not been drafted for the introduction of new law,

but to secure the old principles against abrogation or violation. They are conservatory instruments rather than reformatory; and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation."

Page 213:

"The Constitution makes no attempt to define such [due] process, but assumes that custom and law have already settled what it is. Even in judicial proceedings we do not ascertain from the Constitution what is lawful process, but test their action by principles which were before the constitution," etc.

In the light of the foregoing decisions, it is submitted that the act does not afford the city a fair and impartial trial by a judicial tribunal to determine the validity of the claims asserted against it.

III.

The act also violates article 7 of the amendments to the Constitution in that it denies the parties the right of trial by jury.

Article 7 of the amendments to the Constitution provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

By section 6 of the organic act of the Territory of Oklahoma it is provided that—

"The legislative power of the Territory shall extend to all rightful subjects of legislation, not inconsistent with the Constitution and laws of the United States."

The same general limitation is contained in section 1851, Revised Statutes.

The act of April 7, 1874 (18 Stat., 27), being an act regulating the practice in territorial courts and appeals therefrom, was passed for the purpose of reviving and confirming judgments because of the doubt existing as to whether the common-law and chancery jurisdiction of the courts of the Territory should be kept separate. By that act all proceedings theretofore taken in the courts of the Territories in conformity with their respective codes and rules of practice so far as relate to the form and mode of proceeding were ratified and confirmed subject to the proviso:

> "That no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law."

On behalf of the city it is contended that because of these constitutional and statutory restrictions the legislature of Oklahoma was without power to pass the act under discussion, which deprives the city of the right to have the validity of the claims determined by a jury.

(*a.*) *The constitutional and statutory provisions above cited apply to and are a limitation upon the power of the Territories to in any manner abridge the right of trial by jury.*

That article 7 of the amendments to the Constitution, and the act of April 7, 1874 (18 Stat., 27), are a limitation upon the power of the legislatures of the several Territories to abridge the right therein guaranteed has been settled by numerous decisions of this court

In Idaho Land Co. *vs.* Bradbury, 132 U. S., 509, 513, the question arose as to the method of procedure to be followed in the courts of that Territory. This court held (page 513) that in Idaho, as in the other Territories, there was but one form of civil action for which either a legal or an equitable

remedy might be applied, either through the intervention of a jury or by the court; provided, however, that no party should be "deprived of the right of trial by jury in cases cognizable at common law." Citing act of April 7, 1874 (18 Stat., 27).

In American Publishing Co. *vs.* Fisher, 166 U. S., 464, this court held section 3371 of the Statutes of Utah void on the ground that in civil cases it provided that a verdict might be rendered upon the concurrence of nine members of a jury, which it declared to be a violation of the act of April 7, 1874, c. 80 (18 Stat., 27), preserving to the people of the Territories the right of trial by jury in civil cases when more than $20 was involved, in cases cognizable at common law.

To the same effect is Salt Lake City *vs.* Tucker, 166 U. S., 707, and Webster *vs.* Reid, 11 How., 437.

In Thompson *vs.* Utah, 170 U. S., 343, this court, speaking by Mr. Justice Harlan, again announced the doctrine (bottom p. 346) "that the provisions of the Constitution of the United States relating to the right of trial by jury in suits at common law apply to the Territories of the United States."

It is submitted that these cases abundantly sustain the proposition that the provisions of the Constitution and the statute referred to are a limitation upon the power of the legislature of Oklahoma.

(*b.*) *The claims asserted against the city are claims cognizable at common law. In determining their validity the city is entitled to a trial by jury.*

The city insists, as it insisted and demanded (Rec., p. 12) in the courts below, that in determining the fact whether the claims, the payment of which it is sought to impose upon it, have any validity or merit, it has the right to have that question determined by a jury. On the other hand, the right to impose this burden upon the city, if it can be

called a right, exists solely by virtue of the provisions of the act in controversy. The right, then, if anything, is legal in character.

Walker, in his work on American Law, in speaking of this right, says (page 624):

> "The right, then, to a trial by jury, is confined to proceedings in courts of law, where legal rights, as distinguished from equitable, are decided upon."

In the case of Webster *vs.* Reid (11 How., 437), as in the present case, an attempt was made to provide a special and extraordinary remedy to enforce an alleged right. The two acts in many respects are similar, both being deficient in the essential provisions required by the common law.

In 1838 the Territory of Wisconsin passed an act creating a commission of three persons, whose duty it should be to settle the claims made by persons to the half-breed lands in Lee county and make partition thereof. In 1839, the Territory of Iowa having been created (Lee county then being in Iowa), the legislature of that Territory passed an act authorizing the three commissioners, who had acted under the Wisconsin act, to bring suit against "the owners of the half-breed lands" to recover for the value of the services rendered. The suits were not to be brought against any specific persons, but against the "owners of the half-breed lands;" notice was to be given by publication in a certain newspaper, and the cases were to be tried to the court and not to a jury. The commissioners brought suit, as provided in the act, and recovered judgments against the "half-breed lands," etc. Appeal was taken and the act came before this court for consideration. Several questions were raised on the argument. Among other things, it was urged against the act that it was not brought against any specific persons; no service had been obtained upon any persons, and it denied the right of a trial by jury. The court sustained all these

contentions, saying, Mr. Justice McLEAN delivering the opinion (page 459):

> "This was an extraordinary procedure from its commencement. * * * By the act under which the suits were instituted, no other designation of the defendants was required than 'owners of the half-breed lands lying in Lee county.' * * * No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. * * * In this case there was no personal notice, nor an attachment or other proceeding against the land, until after the judgments. The judgments, therefore, are nullities.
>
> "By the seventh article of the amendments of the Constitution it is declared, 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.'
>
> "The act under which the above proceeding was had prohibited the trial by jury in matters of fact on which the suits were founded. In this respect the act was void."

In the case of Bank of Hamilton *vs.* Dudley's Lessee, 2 Peters, 492, this court held that the provision of the occupant claimant law of Ohio, which declared that an occupying claimant should not be turned out of possession until he should be paid for lasting and valuable improvements made by him, and directed the court in a suit at law to appoint commissioners to value the same (without the aid of a jury), was repugnant to the seventh amendment.

Mr. Chief Justice MARSHALL, delivering the opinion, said (page 525):

> "The seventh amendment to the Constitution of the United States declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' This is a suit at common law, and the value in controversy exceeds twenty dollars. The controversy is not confined to the question of title. The compensation for improvements is an important part of it, and if that is to be determined at common law, it must be submitted to a jury."

In Coal Co. *vs.* Snowdon, 42 Pa. St., 488, the court, in discussing this right under the constitution of that State, says (page 492):

> "'Trial by jury shall be as heretofore, and the right shall remain inviolate.' What can this mean, but that the right of having controverted questions of fact in common-law cases decided by a jury, should be beyond the reach of any department of the Government, whether it be the legislature, the executive, or the judiciary. This was the right which had always been enjoyed before, and if the constitutional provisions were not intended to protect that right in all its length and breadth, they can mean nothing. * * * It cannot mean that the legislature may confer upon the courts 'the power of trying according to the course of chancery, any question which has always been triable according to the course of the common law.'
>
> "No power in our Government can take from the litigant the right to have his case tried by a jury, substantially in the mode and with the same effect as that which belonged to jury trials in similar cases, when the Constitution of 1776 was adopted. * * * What is law and what is equity is a judicial question. * * * The judiciary, no more than the legislature, can deny to any litigant the right of trial by jury, in a case appropriate to such a mode of trial."

In Byers *vs.* Commonwealth, 42 Pa. St., 89, it was held:

> "That the constitutional provision relative to trial by jury was intended to preserve that right as it existed at the formation of our State government, and not to increase or extend it, and must be construed with reference to the statutes that were in force in England, and in the province of Pennsylvania, at the adoption of the first constitution of the State."

To the same effect is Hawes *vs.* Levin, 51 Pa. St., 412.

In Tabor *vs.* Cook, 15 Mich., 322, Judge COOLEY, in passing upon the right of trial by jury under the constitution of that State, said (page 325):

"The present is one of those cases where a right to a trial by jury existed when the constitution was formed; and this right must therefore 'remain.' Whatever proceeding the legislature authorizes for the determination adverse claims, the right of the party in possession to have a jury trial must be kept in view, and some mode pointed out by which he can demand it. The intention here [in the Michigan constitution] is plain; to preserve to parties the right to have their controversies tried by jury, in all cases where the right then existed."

Citing Work *vs.* State, 2 Ohio, 296.
Norval *vs.* Rice, 2 Wis., 22.
Exline *vs.* Smith, 5 Cal., 112.
Hughes *vs.* Hughes, 4 Monr., 43.
See also Supervisors *vs.* Dunning, 20 Wis., 210.

In Risser *vs.* Hoyt, 53 Mich., 185, an act to prevent debtors from giving preferences to creditors was held void because it empowered the court to hear and decide upon questions of fact without the intervention of a jury, in violation of section 27, article 6, of the constitution of Michigan, which provides that "the right of trial by jury shall remain" when demand by one of the parties to the controversy is made.

The act authorized the probate judge to hear and determine summarily the question of the insolvency of the debtor, the giving or attempting to give preferences, and his refusal or neglect to make assignment of his property, and it made the orders and judgments of the court final. If the court determined the questions adversely to the debtor, he was required to appoint a receiver to take possession of the property of the debtor, and convert it into money and distribute it among the proper creditors.

Respecting the objection that the law denied the right of trial by jury, the court says that these inquiries (above stated) "involved valuable property rights under the act, and affect the citizen in the possession, control, and disposi-

tion of his property. They involve questions of fact which are proper to be submitted to a jury" (page 195).

The court comments on the decision in Weston *vs.* Loyhed, 30 Minn., 221, which upheld a similar act of that State, saying (bottom page 199):

> "It needs no argument to demonstrate how inapt this reasoning is to the framework of government under which legislative and judicial power is exercised in this State. It concedes that a proceeding in accordance with the statute would not be 'due process of law,' but deficiencies in the legislative act are to be supplied by the court as occasions arise, and the court is 'to devise and direct such a course of procedure that the object of the law may be accomplished.' Another provision of our constitution stands in the way of adopting this decision as a correct exposition of the law. The judiciary are prohibited from exercising legislative functions."

The court continues, bottom page 200:

> "The reason assigned by the [Minnesota] court that the act is a new one, creating a new tribunal whose proceedings are not 'at law' or according to the course of the common law, but special in their nature, corresponding more nearly to a court of equity, does not appear to me to be sufficient to uphold the constitutionality of the law as against the objection made. It was against the enactment of new laws which ignored the proceedings according to the course of the common law, and provided summary methods of determining legal rights, that the protecting shield of the Constitution was required. The true criterion is, Does the act destroy or materially impair the right of trial by jury according to the course of the common law, in cases proper for the cognizance of a jury? The nature of the controversy between the parties, and its fitness to be tried by a jury according to the rules of the common law, and not the nature of the tribunal, nor the summary mode of proceeding therein, should decide the question."

Again, middle page 201:

"In People *vs.* Lawton, judge of probate, 30 Mich., 386, this court held that a law was not enforceable unless it furnished adequate means to secure the purposes for which it was enacted. The fault in that case was the failure to provide for a jury to try the charge in the probate court."

Bottom page 202:

"I do not decide that there are not many questions which might be raised under this statute which it would be competent for a court to decide without the intervention of a jury, and I confine myself to those which are of common-law cognizance, as distinguished from those of an equitable nature. For instance, under section 2 of this act two facts, at least, must concur before the debtor can be deprived of his property: 1. He must owe three or more debts, two at least amounting in the aggregate to not less than $200; 2. He must have done some act, or omitted to do some act, which this section prescribes shall entitle two or more creditors to file a petition. These acts are treated as a fraud upon the rights of other creditors, and constitute the gist of the proceedings. Such issues, involving the elements of fraud both as to the debtor and creditor alleged to have been preferred, are such as are peculiarly appropriate for a jury, and the right to have such trial cannot be taken away by a summary proceeding of this kind. There is a class of cases where it is competent to enter judgment upon motion without the intervention of a jury, such as upon appeal bonds, recognizances, and the like; but in these cases the breach is known to the court as matter of record, and there can be no matter of fact *in pais* to be tried. In such cases no constitutional right is violated.

"From what has been said concerning the deprivation of the right of trial by jury, it is apparent that the act deprives parties of their property without due process of law. * * * The method of inquiry is not according to the course of the common law. In no proper sense is a trial had at all."

Replying to the contention that the courts of Minnesota had sustained a law similar to the statute under consideration, Mr. Chief Justice COOLEY said (bottom page 209):

> "It is said that a statute similar to this has been sustained in Minnesota. But it does not necessarily follow that the same statute would be sustained here. The Minnesota system of judicial procedure is quite different from ours, and such an act may perhaps receive help in that State from other statutes and from the code of procedure which it could not have here. In this State such an act must fail unless it is sufficient in itself; for it does not come in as a part of any existing system, and has nothing else in the statutes to supply its deficiencies."

The case of Work *vs.* Ohio, 2 Ohio St., 296, was one involving the constitutionality of an act of that State providing for a jury of six persons in the trial of criminal prosecutions in the probate courts.

It was held that the essential and distinguishing features of the trial by jury as known at the common law and generally, if not universally, adopted in this country were intended to be preserved and all its benefits secured to the accused in all criminal cases by the Ohio constitution.

Respecting the character of this right, the court, speaking by RANNEY, J., says (middle page 302):

> "What, then, is this right? It is nowhere defined or described in the Constitution. It is spoken of as something already sufficiently understood, and refers to it as a matter already familiar to the public mind. * * * If ages of uninterrupted use can give significance to language, the right of jury trial * * * stand as representatives of ideas as certain and definite as any other in the whole range of legal learning."

In the case of Turnpike Co. *vs.* Parks *et al.*, 50 Ohio St., 568, it was held that a statute of that State which attempted to authorize the probate judge of a county to declare a turnpike road abandoned and vacated as a toll road

without the intervention of a jury or the right of appeal was in violation of section 5, article 1, of the Ohio constitution, which provides that "the right of trial by jury shall be inviolate." Before the road could be vacated it was necessary for the court to find that it had been out of repair for at least six months, when, upon the finding of the probate court, the road should be deemed vacated and become a free road. Respecting the finding to be made by the probate judge, the supreme court, speaking by DICKMAN, J., says (page 577):

> "To determine the existence of a state of facts upon which to base a destruction of property rights and interests, strict regard should be had in the investigation to the methods and safeguards prescribed by the Constitution."

Page 578:

> "At common law the want of reparation of highways, when visited with fine, penalty and forfeiture, was the subject of inquiry by a jury."

Page 581:

> "In the Federal courts it is the accepted doctrine, that while actions *in rem* in admiralty property may be divested from an owner without the verdict of a jury, yet, in any proceeding at common law, even proceedings *in rem*, a citizen of the United States cannot be divested of his property except by verdict of a jury, under due process of law, in a proceeding in which he is in some manner a party, having opportunity to be heard, and having a day in court."
>
> "Upon reason and the weight of authority, we are of opinion, that in the case at bar the plaintiff in error was entitled to a jury in the probate court; that to deprive the turnpike company of the right to demand and receive toll for the use of its road without a trial by jury, would be to take its property without due course or process of law."

The claims asserted here are based upon contracts, upon which, it is obvious, a common-law action would lie. Suppose the creditors were asserting their claims against the parties who contracted with them. Will it be contended that, under the common law, the debtors would not be entitled to a trial by jury? Can the legislature, as against them, destroy that right by providing a special method for the collection of the claims? Can it by shifting the burden upon other persons, not parties to the contracts, deny to those upon whom it is shifted the same rights as were possessed by the contracting debtors? The legislature is without power to deprive either the contracting debtors or the city of that right. The right existed under the common law; is protected by the Constitution, and the legislature cannot destroy it merely by changing the remedy for enforcing the collection of the debt. It is therefore respectfully submitted that the statute under discussion in attempting to fix upon the City of Guthrie a liability for these claims is in violation of the seventh amendment to the Constitution of the United States, in that it does not provide for or contemplate the determination of such question of liability by a jury.

IV.

The act is special legislation and violates the provisions of the act of Congress of July 30, 1886 (24 Stats., 170).

The act is a special one, and therefore in violation of the act of July 30, 1886, chapter 818 (24 Stats., 170), which forbids the legislature of a Territory from passing any special law where a general law can be made applicable, and the passing of any local or special law regulating practice in the courts of justice.

(*a.*) In discussing the question of the denial by this act of due process of law it was necessary to point out in detail its provisions. It is classed in the statutes as "chapter 14, article 1." By its express provisions it can apply only to the indebtedness created by the people of the four provisional governments named. In this respect it is contrary to that provision of the act of July 30, 1886, which forbids the passing of a special law where a general law can be made applicable.

The purpose of the act as expressed in its title is to provide a method for the determination of the existence and validity of indebtedness incurred by the four provisional governments named. In order to have made the act one of a general nature, it was at least necessary that it should apply to all indebtedness incurred by provisional governments within the Territory, which would have made it apply to a particular class of claims. We fail to perceive such a distinction in character between the indebtedness incurred by these particular so-called governments and any other indebtedness, or between debts of the kind in question incurred by any other provisional governments within the Territory.

A law to accomplish the purpose desired could have been so framed as to have provided a remedy for the ascertainment and settlement of the indebtedness incurred by all provisional governments in the Territory. That other similar governments incurred indebtedness is apparent by a reading of article 2 of chapter 14, Oklahoma Statutes, another special law, providing for the ratification, confirmation, and payment of the indebtedness incurred by the provisional government of the city of Kingfisher.

It is submitted that there is no ambiguity in the language used in the act, and that the words must be given their ordinary meaning; that the act forms no part of the general code of civil procedure, but must be considered as complete in itself, and that therefore it is special legislation.

"A law of a general nature is one which operates alike upon all within a particular class. A law is not general in any correct sense of the term, but is special, where it is suspended in one locality, where exists a proper subject-matter on which to operate, but is in full force in another locality of exactly the same kind. This uniformity is in the sense that the law shall operate the same in all parts of the State under the same circumstances and conditions. Such law must embrace all and exclude none whose condition and wants render such legislation equally necessary or appropriate to them as a class" (Ohio *ex rel. vs.* Board of Elections, just decided).

This language of the Ohio circuit court exactly fits the case at bar; but even if the act were so framed that it would include the indebtedness incurred by all provisional governments, we do not concede that it would then be general, inasmuch as its subject-matter would still be claims or indebtedness.

(*b.*) *A new forum created.*

Again, it attempts to create a new forum, if such it may be called, in which to adjudicate these particular claims, in violation of the act of July 30, 1886 (24 Stats., 170). It creates a commission consisting of three persons, who shall be appointed by the district judge of Logan county. The commissioners are required to give ten days' notice in a newspaper of the time and place of hearing the claims, and the persons must present their claims within 30 days from the date of the first publication of the notice or be forever cut off from asserting them. After the commission has passed upon them, they are required to be submitted to the district court for approval or disapproval. If the judge approves, they are to be certified to the mayor and council of the city and warrants are to be issued therefor. This is the complete method of procedure provided. There is no state-

ment, nor reference, nor even intimation, that, after approval or disapproval by the judge, an appeal or writ of error may be taken or allowed. Had the legislature so intended, such intention would have been expressed in the act.

It is to be observed that it is the district judge, and not the district court, who appoints the commissioners and approves or disapproves of their finding. The power attempted to be exercised by the commissioners in determining the validity of these claims was judicial in its nature. If so, then the legislature attempted to create an additional court or forum for their hearing and determination, and so contravened the provisions of the act of July 30, 1886, *supra.*

(c.) *In this respect the act violates section 9 of the organic act of the Territory, which provides a complete system of judicial machinery for the hearing and trial of all matters proper to be submitted and determined by the courts.*

The act is classed in the statutes of Oklahoma as article 1, section 14. It bears no relation to, nor does it make any reference to, the general code of civil procedure. The general code is embraced in sections 3873 to 4638, inclusive, of the Statutes of Oklahoma. There is nothing in the act which, even by implication, refers thereto or indicates an intention on the part of the legislature to provide or require that, after the finding and report to the district court by the commissioners or referees and the approval or disapproval of their report by the district judge, the matter could then be taken on error or appeal and proceed as a matter arising under the general code. The language of the act is that "all claims allowed and approved by the district judge shall be certified to the mayor and council of the village of Guthrie, who are hereby authorized and directed to issue warrants upon the village and payable by the villages to the holders and owners," and requiring their payment in installments. The act then provides that the mayor and

council of the villages shall levy a tax upon the property of the residents of the villages to pay the warrants issued for the amounts found by the commission to be due upon the claims. If it were intended that an appeal or writ of error should be allowed, what necessity was there to provide the special board or tribunal to hear and determine the matters in the first instance? It was evidently intended that the act should be complete in itself, and for this reason the legislature, in attempting to pass such a law and to provide a new and additional tribunal to determine matters essentially judicial in their nature, violated the section of the organic act referred to.

(*d.*) *Judicial power is attempted to be conferred.*

If the general rules in the interpretation of statutes, that where there is no ambiguity the words shall be given their ordinary meaning, and that where a special act is passed on a particular subject the general law must be construed as not applying to the cases embraced by the special act, govern in this matter, then the legislature attempted to create a new tribunal in violation of the organic act, for the powers attempted to be exercised by the commissioners were judicial in their nature, and such as can only be exercised by a court.

What, then, is judicial power when applied to the subject-matter of this act?

In Murray's Lessees *vs.* Hoboken Land & Improvement Co., 18 How., 272, this court, speaking by Mr. Justice CURTIS, exhaustively discusses the nature of judicial power, and points out the distinction between what constitutes that power when exercised in the enforcement of different rights in favor of the Government and the acts of an officer when passing upon a controversy between private parties. On page 284, in speaking of the power of Congress, he says:

"To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at common law," etc.

The same limitation upon the power of the legislature of a State applies which limits the power of Congress to destroy or take away this right.

Further, the court say:

"It is true, also, that even in a suit between private persons to try a question of private right, the action of the executive power, upon a matter committed to its determination by the Constitution and laws, is conclusive."

But this is because the power is given in the Constitution, and the law only points out the method of its exercise. But where the power is not expressly given in the Constitution, no act of Congress or of a legislature can confer it.

In Musser *vs.* Adair, 55 Oh. St., 466, the court, speaking by MINSHALL, J., discusses judicial power and says (bottom page 471):

"Whether the power [to hear and determine] is judicial or not depends not only upon the nature and character of the question, but upon the manner and circumstances under which it is to be determined. * * * Judicial powers are those conferred on judges as courts in the hearing and determination of questions arising in litigation between parties in actions pending before them (bottom page 472, citing numerous decisions).

Page 473:

"A county auditor cannot be empowered to hear and determine an issue between A and B as to title to land, or to a horse, or as to whether A should recover of B a certain sum of money. These are judicial questions

and can only be determined in a proper proceeding by a court."

See also State *ex rel. vs.* Harmon, 31 Ohio State, 250.

Decamp *vs.* Archibald, 50 Ohio State, 618, 625.

In Elliott on Appellate Procedure, section 8, it is said:

"Judicial power can only reside in courts, although powers in their nature judicial may be conferred upon ministerial officers. The power to decide controversies between litigants is strictly judicial, but judicial power is not confined to the sole act of deciding or of giving judgment, for judicial power extends beyond the simple act of deciding or adjudging, and embraces many incidents connected with the administration of justice."

See also Cooley's Const. Lim. (6th ed.), page 108.

(*c.*) *The hearing before the commissioners and the action of the district judge in approving or disapproving their findings was in no sense a judicial hearing or determination.*

If the action of the commissioners in determining the validity of the claims was not of a judicial character, then in no sense was there a trial had upon these claims. Can it be said that in reviewing the action of the commission the action of the district judge is a judicial determination of a controverted matter? No authority is given him to retry or rehear. He simply examines the report submitted to him and approves or disapproves. Nowhere in the act is the commission given authority to make or enforce any order, to require the production of any books or papers, to administer oaths, to issue process and compel witnesses to appear and testify, or to punish a witness for refusing to testify. As has been argued *supra*, these are but naked legal claims—legal solely because of this act of the legislature. At common law a party against whom such a claim is as-

serted is entitled to have his rights determined according to the ordinary mode of judicial procedure, with the opportunity to be heard in his defense. This is the trial afforded by the common law and protected by the Constitution. The legislature cannot abridge this right nor change the character of the claim by changing the remedy for enforcing it. It is nothing more than an action on a contract, which is cognizable at common law. The city is entitled to have these matters tried before a judicial tribunal. These commissioners possessed no judicial power whatever; nor could such power be conferred upon them. In no sense was there a trial had before the commissioners. The judge acted upon their report. He had no power to go outside the record. His duty was to review, not to retry.

V.

The claims not valid against the city.

The claims and demands which are the basis of this proceeding, contracted by the persons assuming to act as officers of the provisional governments of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, are not valid claims upon the city of Guthrie. Not having been incurred by the officers of either a *de jure* or *de facto* government, they are valid only as against the persons who contracted them.

In proceeding to discuss this proposition, it becomes necessary to a proper determination of the question to look to the character of the so-called provisional city governments. When the Territory was thrown open for settlement there was no law in existence providing for the organization of any kind of a municipal government therein, and no such authority existed until the passage by Congress, on May 20, 1890, of the organic act of the Territory. In the settlement of the Territory town sites were established by the settlers

who secured lands most advantageously situated for such purpose. These sites were surveyed and laid out into squares and blocks and lots, with streets and alleys. The people gradually gathered at the places chosen as sites for cities, and formed quite large communities. There being no law for the organization of cities and towns, the people of these communities formed what afterwards became known as provisional governments. They chose from among themselves persons to act in the capacity of officers of these voluntary organizations, which persons attempted to discharge the duties and functions of officers of so-called cities and villages. In this manner were formed the provisional governments of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, which immediately adjoined each other. The persons chosen by the people of these communities to act in the capacity of officers and to discharge the functions devolving upon officers of legal municipalities in carrying on these so-called governments incurred a large amount of indebtedness, without the power or authority to create a fund by taxation or otherwise with which to pay off the indebtedness so incurred. The claims involved in this controversy were incurred by the persons assuming to act as officers of these four provisional governments.

On behalf of the City of Guthrie it is contended that these so-called provisional governments had no existence in law, but were the mere voluntary associations of individuals, existing wholly without authority of law. They were mere voluntary communities of individuals assuming to take upon themselves the functions and powers of government without authority to enforce any act of government. The debts contracted by their so-called officers were the debts of the persons making the contracts, who alone are liable for their payment, because the persons assuming to act as officers were neither *de jure* nor *de facto* officers.

The question of the legal status of these provisional governments now included within the city of Guthrie has been

before the courts of the Territory of Oklahoma on several occasions. Respecting their legal character, the Supreme Court, in the case of Guthrie *vs.* Territory *ex rel.*, 1 Okla., 188, said (bottom page 193):

"It is a well established rule of law that before there can be a *de facto* municipal corporation there must be some authority for a *de jure* corporation. A *de facto* corporation cannot exist where there is no law authorizing a *de jure* corporation (Norton *vs.* Shelby Co., 118 U. S., 426; Evenson *et al. vs.* Ellingston *et al.*, 67 Wis., 634).

"'The proposition which lies at the foundation of the law of corporations of this country is that here all corporations, public and private, exist and can exist only by virtue of express legislative enactment, creating or authorizing the creation or existence of the corporate body. Legislative sanction is with us absolutely essential to lawful corporate existence' (Dillon, Mun. Corp., sec. 37).

"Was there any legislative sanction to the existence of municipal corporations prior to the act of Congress, approved May 2, 1890? We are unable to find any such authority. These provisional governments grew out of a necessity made by the absence of legal authority. They were aggregations of people associated together for purposes of mutual benefit and protection. Without any statute law, they became a law unto themselves and adopted the forms of law and government common among civilized people, and enforced their authority by the power of public sentiment. They had no legal existence; they were nonentities; they could not bind themselves by contracts, or bind any one else."

To this effect are the decisions in the cases of Oklahoma City *vs.* Richardson Lumber Co., 3 Okla., 5; Bank of Guthrie *vs.* McElhinney, 5 Okla., 107, and Guthrie *vs.* Wylie, 55 Pac. Rep., 105.

"While acts of a *de facto* incumbent of an office lawfully created by law and existing are often held to be binding from reasons of public policy, the acts of a per-

son assuming to fill and perform the duties of an office which does not exist *de jure* can have no validity whatever in law" (Norton *vs.* Shelby Co., 118 U. S., 425).

"But it is contended that if the act creating the board was void, and the commissioners were not officers *de jure*, they were nevertheless officers *de facto*, and that the acts of the board as a *de facto* court are binding upon the county. This contention is met by the fact that there can be no officer, either *de jure* or *de facto*, if there be no office to fill. As the act attempting to create the office of commissioner never became a law, the office never came into existence (Norton *vs.* Shelby Co., 118 U. S., 441).

"There must be a legal office in existence, which is being improperly held, to give to the acts of such incumbent the validity of an officer *de facto*" (*supra*, bottom page 444).

To the same effect is the decision in the case of Carleton *vs.* People, 10 Mich., 250, 259.

This court, in the case of Shapleigh *vs.* San Angelo, 167 U. S., 646, 658, refers to the case of Norton *vs.* Shelby Co. (118 U. S., 425) with approval.

In Comanche Co. *vs.* Lewis, 133 U. S., 198, 202, it was said that, although the legislature of Kansas had the power to cure all defects in the organization of a county, the court expressly held that "there must be a *de facto* organization upon which this recognition may act," citing 12 Kansas, 441, 446.

Further upon this point, see—

Wyandotte County *vs.* Kansas City, 47 Pac. Rep., 326.

While the legislature has undoubted power to compel municipal bodies to perform their functions as local governments under their charters, it has no power against the will of the corporation to compel it to assume obligations not within the ordinary functions of municipal government. The State in such cases may remove restrictions and permit

action, but cannot compel it (Cooley's Const. Lim. (6th ed.), pages 283–285).

So far as a municipal corporation is endowed with the power of contracting and of acquiring and disposing of property, it stands on the same ground of exception from legislative control and interference as a private corporation or individual. The legislature has no more right to impose the burden of paying these claims upon the City of Guthrie than it has to impose that burden upon private individuals. But, admitting that it does possess that power, it cannot require payment by the city of indebtedness not incurred for municipal purposes (People *ex rel* McCagg *vs.* Mayor, 51 Ill., 17; State *ex rel. vs.* Tappan, town clerk, 29 Wis., 664; Atkins & Co. *vs.* Town of Randolph, 31 Vt., 226; Hampshire *vs.* Franklin, 16 Mass., 76; Bank *vs.* McIlhinney, 5 Okla., 111).

As to third persons who seek to enforce pecuniary liabilities against towns, arising upon contract, such towns are merely private corporations or individuals and possess the same rights possessed by individuals (State *ex rel. vs.* Tappan, 29 Wis., 664).

It is to be noted that this act attempts to impose upon the city the payment of not only the claims incurred for municipal purposes, and for which the city derived some benefit, but (sec. 1) attempts to impose upon it the payment of "all claims and demands of every character * * * issued by the city governments * * * for all purposes."

If it be contended that the city received benefit from the contracts upon which the claims are based, and therefore in equity should pay them, why should it be compelled to pay for that from which it derived no benefit—that is, for that which was not a lasting benefit, but in which the benefits terminated at the termination of the services rendered? What benefit did the city and citizens of the city derive from the services of a person assuming to act as mayor, marshal, city clerk, or city treasurer, or for legal services rendered (Rec., pp. 22, 26), or for a medal for services rendered, and

for similar claims against these so-called provisional governments which in law had no existence whatever? These provisional governments were organized without authority of law and in the absence of any law authorizing the incorporation of any municipality. The liabilities incurred were therefore personal liabilities upon those who incurred them, and they cannot be changed into liabilities upon the municipality which ensued and which became such under the law when the law authorizing the creation of municipal corporations was enacted.

If the legislature possesses this power, then it may compel a citizen to pay debts contracted by private persons and from which the citizen has and can derive no benefit whatever.

For the convenience of the court the material portions of the statutes cited are printed in the appendix.

Reply to the Brief for Plaintiff in Error and Appellee.

(1.) The first point made by counsel for the plaintiff in error is (Brief, p. 12) that the territorial court erred in its conclusion that the test of the four per cent. limit of indebtedness should be applied at the date of the issuance of the warrants, and not of the date of the passage of the act of July 30, 1886.

While this question was raised before the district judge (Rec., p. 8), it was not decided by the court, the ground for the dismissal of the proceedings being (Rec., p. 29) that the law under which the proceedings were had was void. How the question becomes material here is not apparent. The question before this court is the validity of chapter 14, article 1, Statutes of Oklahoma, and not the proper construction to be placed upon the act of July 30, 1886.

(2.) The next contention is that the court erred in its

conclusion that the legislature could not impose the payment of these claims upon the city of Guthrie.

The Oklahoma case cited in support of this contention has been overruled. The other cases cited do not answer the objection made. All the court there decides is that the legislature may legalize the acts of *de jure* officers when they have exceeded their power in issuing bonds, and this on the theory that the municipalities have received the proceeds of the bonds, and in any event could be compelled to refund the money received if the bonds were illegal.

The question here is whether the legislature may shift the liability incurred by private persons and impose it upon a city, irrespective of whether it has received any benefit from the transactions.

(3.) Next the claim is made that there is nothing in the act which prohibits the taking of an appeal or writ of error from the order of the district judge; that such action may be taken under the general code and the organic act.

The answer is, there is nothing in the act indicating an intention to permit an appeal. The act, being a special remedy, unambiguous in its terms, must be held to stand alone, and to permit no appeal under the general laws.

Again, a court can only review the judgment of a court (Musser *vs.* Adair, 55 Ohio St., 470). Under this act the court could not render a judgment. All it was authorized to do was to approve or disapprove the finding of the commissioners, a finding which had no judicial force whatever. Under the general code a judgment is based upon a trial or a judicial finding. Here there was neither. If the general statute providing for appeals and writs of error applies in this case, then the other statutes regulating the other steps to be taken must apply, and they were not in this instance complied with.

Again, section 9 of the organic act forms no part of the system of judicial procedure for the Territory. It simply

provides a system of courts, leaving to the legislature full power, subject to certain conditions and restrictions, to provide the modes of proceeding in those courts (Hornbuckle *vs.* Toombs, 18 Wall., 655, 656), and is a standard for determining whether the modes provided are proper.

(4.) To the contention that the act does not deny the right of trial by jury, after the action of the commissioners and district judge, it may be said there is nothing in it which would give that right. After the district judge has passed upon the action of the commissioners, if approved by him, the claims are required to be certified to the city officers and warrants issued. It would be doing a vain thing to try a cause to a jury after the court in which it was pending had passed upon it.

(5.) Respecting the next point made, it may be said that, at common law the validity of the claims in suit would be properly triable by a jury. The constitutional provision is intended to preserve that right wherever it existed under the common law. The legislature cannot destroy the right by changing the remedy. If so, then the legislature may destroy the right and deny the right of trial by jury in all civil matters. The test is whether at common law the matter would be triable to a jury.

(6.) It is insisted that the shadowy character of some of the claims cannot be raised here in order to question the right of the legislature to pass the act; that that question was for the lower court to deal with.

Deal with how? What power was there in the district court to determine their shadowy character? All that court was empowered to do was to approve or disapprove the action of the commissioners—that is, act as a board of review. The city did object (Rec., p. 8) to the shadowy character of some of the claims, charging that some were fraud-

ulent in their inception, and others beyond the power of municipal officers to incur; but what judicial machinery was provided to determine those facts? None whatever. The commissioners could not administer oaths, and were absolutely without power to make or enforce any order whatever. It is asserted that these are equitable claims which the city should be compelled to pay; but, if so, the city certainly should be afforded a proper method for determining what claims are just and proper to be paid.

It is respectfully submitted that if this court determines it has jurisdiction to review the action of the territorial courts, then the judgment of the supreme court of Oklahoma should be affirmed.

W. J. HUGHES.
JOHN L. LOTT.

JOHN K. RICHARDS,
D. R. WIDMER,
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APPENDIX.

STATUTES OF OKLAHOMA, 1890.

CHAPTER 14.—*City Indebtedness.*

"AN ACT for the purpose of providing for the allowance and payment of the indebtedness heretofore created by the people and cities of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, now consolidated into the village of Guthrie." [Took effect December 25, 1890.]

Article 1.—Guthrie, East Guthrie, West Guthrie, and Capitol Hill.

(553.) SECTION 1. That the district judge of Logan county is hereby empowered to appoint three disinterested persons to act as a commission or referees to inquire into and pass upon all claims and demands of every character heretofore issued by the city governments mentioned in the caption of this act, for all purposes.

(554.) SEC. 2. That the owners and holders of any kind of scrip, warrants or other evidence of indebtedness heretofore issued by the city governments of Guthrie, East Guthrie, West Guthrie and Capitol Hill, shall present their claims to the commissioners or referees, to be appointed by the district judge, under oath, stating that the same is a *bona fide* claim, that they performed the labor or advanced the money or furnished the materials or purchased same for a valuable consideration, and that they believe the city, issuing the same did so for necessary expenses incurred in running the city government, and said master shall hear further evidence if he deem necessary before allowing the same.

(555.) SEC. 3. The commission or referees shall keep a record of all claims filed with them for allowance and keep their office open during the hours of nine o'clock in the morning and four o'clock p. m., and shall be allowed sixty days to hear and determine all claims, or longer if the district judge so orders. Said commission or referees shall immediately after this appointment extend ten days' notice in

some newspaper published in the village of Guthrie, notifying all parties holding or owning any claims mentioned in this act to present the same to them for allowance; and all persons who fail to present their claims within thirty days from date of first publication mentioned in this section shall be forever precluded from so doing hereafter.

(556.) SEC. 4. That after the commission or referees shall have passed upon and allowed any and all claims mentioned in this act, they shall make a report to the district court of same showing the names and amounts allowed by them and also all claims and the names of persons and amounts disallowed by them, for approval or disapproval of the district judge. And all claims allowed and approved by the district judge shall be certified to the mayor and council of the village of Guthrie, who are hereby authorized and directed to issue warrants upon the village and payable by the village to the holders and owners, payable in installments each of the amounts to be in one, two, three, four and five years to bear interest at the rate of six per cent. per annum from the date of the allowance by the commission or referees, and said mayor and council of the village of Guthrie shall levy a tax upon the property of the residents of said village to pay the warrants herein referred to, levying same upon each subdivision heretofore constituting Guthrie, East Guthrie, West Guthrie and Capitol Hill according to the amount of indebtedness created by the city councils, the mayors and school boards, heretofore acting for and in behalf of the people resident of said cities. Each of said cities to be liable for and taxable under this act for the amount of indebtedness created by them.

(557.) SEC. 5. That said commission or referees shall be allowed such compensation as the district judge may allow them for the services to be performed by them under this act, and the village of Guthrie shall pay the same to the said commission or referees upon the order of the district judge.

ORGANIC ACT, TERRITORY OF OKLAHOMA.

(Approved May 2, 1890; 26 Stats., 81.)

SECTION 9. That the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace. The supreme court shall consist

of a chief justice and two associate justices, any two of whom shall constitute a quorum. They shall hold their offices for four years, and until their successors are appointed and qualified, and they shall hold a term annually at the seat of government of said Territory. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of the justices of the peace, shall be as limited by law: *Provided*, That justices of the peace, who shall be elected in such manner as the legislative assembly may provide by law, shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars; and said supreme and district courts, respectively, shall possess chancery as well as common-law jurisdiction, and authority for redress of all wrongs committed against the Constitution or laws of the United States or of the Territory affecting persons or property. Said Territory shall be divided into three judicial districts, and a district court shall be held in each county in said district thereof by one of the justices of the supreme court, at such time and place as may be prescribed by law, and each judge after assignment shall reside in the district to which he is assigned. The supreme court shall define said judicial districts, and shall fix the times and places at each county-seat in each district, where the district court shall be held and designate the judge who shall preside therein. And the territory not embraced in organized counties shall be attached for judicial purposes to such organized county or counties as the supreme court may determine. The supreme court of said Territory shall appoint its own clerk, who shall hold his office at the pleasure of the court for which he is appointed. Each district court shall appoint its clerk, who shall also be the register in chancery, and shall keep his office where the court may be held. Writs of error, bills of exception, and appeals shall be allowed in all cases from final decisions of said district courts, to the supreme court under such regulations as may be prescribed by law, but in no case removed to the supreme court shall trial by jury be allowed in said court. Writs of error and appeals from the final decisions of said supreme court shall be allowed and may be taken to the Supreme Court of the United States, in the same manner and under the same regulations as from

the circuit courts of the United States, where the value of the property or the amount in controversy to be ascertained by oath or affirmation of either party or other competent witnesses, shall exceed five thousand dollars; and each of said district courts shall have and exercise, exclusive of any court heretofore established, the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States. In addition to the jurisdiction otherwise conferred by this act, said district courts shall have and exercise exclusive original jurisdiction over all offenses against the law of the United States committed within that portion of the Cherokee outlet not embraced within the boundaries of said Territory of Oklahoma as herein defined, and in all civil cases between citizens of the United States residing in such portion of the Cherokee outlet, or between citizens of the United States, or of any State or Territory, and any citizen of or person or persons residing or found therein, when the value of the thing in controversy or damages or money claimed shall exceed one hundred dollars; writs of error, bills of exceptions, and appeals shall in all such cases, civil and criminal, be allowed from the district courts to the supreme court in like manner, and be proceeded with in like manner as in cases arising within the limits of said Territory. For all judicial purposes as herein defined such portion of the Cherokee outlet not embraced within the boundaries of the Territory of Oklahoma shall be attached to, and be a part of, one of the judicial districts of said Territory, as may be designated by the supreme court. All acts and parts of acts heretofore enacted, conferring jurisdiction upon United States courts held beyond and outside the limits of the Territory of Oklahoma as herein defined, as to all causes of action or offenses in said Territory, and in that portion of the Cherokee outlet hereinbefore referred to, are hereby repealed, and such jurisdiction is hereby given to the supreme and district courts in said Territory and in the Cherokee outlet, prior to the passage of this act, shall be tried and prosecuted, and proceeded with until finally disposed of, in the courts now having jurisdiction thereof, as if this act had not been passed. The said supreme and district courts of said Territory, and the respective judges thereof, shall and may grant writs of mandamus and *habeas corpus* in all cases authorized by law; and

he first six days of every term of said courts, or so much hereof as shall be necessary, shall be appropriated to the rial of causes arising under said constitution and laws; and rits of error and appeals in all such cases shall be made to he supreme court of said Territory, as in other cases.

CHAPTER 818, U. S. Statutes; 24 Stat. at Large, 170.

Approved July 30, 1886.

SECTION 1. That the legislatures of the Territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases, that is to say:

Regulating the practice in courts of justice.

* * * * * * *

In all other cases where a general law can be made applicable, no special law shall be enacted in any of the Territories of the United States by the territorial legislatures thereof.

* * * * * * *

SECTION 4. That no political or municipal corporation, county, or other subdivision in any of the Territories of the United States shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property within such corporation, county or subdivision, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount given by such corporation shall be void, etc.